

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ALLYN J. RICKARDS,

Appellant.

No. 37759-4-II

UNPUBLISHED OPINION

Bridgewater, J. — Allyn J. Rickards appeals his conviction for third degree assault. We affirm his conviction.<sup>1</sup>

On September 1, 2007, at approximately 1:30 am, Kristen Sage, Rachel Dreon and David Matthews, employees at the Pine Tree Restaurant and Lounge in Shelton, were attempting to clear the bar after a large fight involving about 10 people. As the three tried to get Rickards and his companions to leave, Rickards grabbed a chair and swung it at them. He insisted that they let him back in so he could get a hat. After Matthews and another male employee got Rickards to put down the chair, he pulled his fist up and attempted to punch Sage. Matthews, Sage, and Dreon called the police.

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<sup>1</sup> A commissioner of this court initially considered Rickards' appeal as a motion on the merits under RAP 18.14 and then referred it to a panel of judges.

When he arrived, Deputy Rhoades<sup>2</sup> removed Rickards from the restaurant. Rickards attempted to leave and Officer Brent Dehning told him he had to sit down on the curb. Rickards became “very angry and very aggressive,” so Officer Dehning grabbed Rickards’ right arm and attempted to place him in handcuffs. II RP at 96. Officer Dehning managed to turn Rickards around and place one of Rickards’ hands behind his back, but Rickards refused to give his other arm. In response, Officer Dehning placed Rickards up against the fender of his patrol car and Rickards stretched out over the top of the car. As Officer Dehning attempted to reach Rickards’ free arm, Rickards repeatedly threw his head back and moved his arms.

To obtain compliance, Deputy Rhoades struck Rickards with a baton on the left side of his rib cage. Despite repeated commands from Officer Dehning, Rickards continued to resist. Eventually, Officer Dehning stepped back and Deputy Rhoades used a Taser on Rickards. Rickards laughed, cursed, and claimed the Taser did not work. Officer Dehning then took Rickards to the ground. Rickards continued to resist commands to roll over and put his hands behind his back. Instead, he kicked at Officer Dehning and threw his arms around. As Officer Dehning stepped in to turn Rickards over, Rickards kicked the outside of Officer Dehning’s left knee. Deputy Rhoades used the Taser on Rickards twice more before he complied with orders to roll over. Officer Dehning then placed Rickards under arrest.

The State charged Rickards with third degree assault for kicking Officer Dehning. Officer Dehning testified that each shot from a Taser releases an electrical charge of 50,000 volts for a five-second cycle, which “locks [the recipient’s] muscles down.” II RP at 112. Typically, a person upon whom a Taser is used “[c]omplete[ly] [loses] muscle control[, and] usually fall[s]

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<sup>2</sup> Deputy Rhoades’s first name is not given in the transcript.

down.” II RP at 101. Officer Dehning stated that while the Taser is releasing its charge, a person cannot flail his or her arms and legs.

Rickards testified and denied remembering assaulting Officer Dehning. He said that if he kicked Officer Dehning, it must have occurred while one of the officers used the Taser on him. Rickards insisted that he did not have control over his body when the kick occurred. But he also did not deny that he kicked Officer Dehning.

The jury found Rickards guilty as charged.

First, Rickards argues that the State failed to present sufficient evidence to prove that he intentionally assaulted Officer Dehning in a harmful or offensive manner. We use the familiar test for sufficiency set forth in *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) and *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Rickards of third degree assault under RCW 9A.36.031(1)(g), the State had to show that Rickards (1) assaulted a law enforcement officer, (2) who was performing his official duties at the time of the assault. But taking the evidence in the light most favorable to the State, the evidence supports a finding that Rickards intentionally kicked Officer Dehning. Rickards was angry and argumentative. He resisted the police officers on a number of occasions. Officer Dehning testified that while a Taser is releasing its charge, a person has no control over his or her muscles and cannot move, let alone flail his or her arms and legs. Rickards did not deny that he kicked Officer Dehning. The jury could reasonably find that Rickards’ kicking of Officer Dehning was not the result of the Taser and was instead intentional.

Rickards also argues that substantial evidence does not support a finding that he touched Officer Dehning in an offensive or harmful manner. An assault is an intentional touching or striking of another person, with unlawful force, which is harmful or offensive regardless of whether any physical injury is done to the person. *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007) (citing *State v. Shelley*, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997)). A touching is offensive or harmful if the touching or striking would offend any ordinary person who is not unduly sensitive. *State v. Stevens*, 158 Wn.2d 304, 315, 143 P.3d 817 (2006) (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 291 (2d ed. Supp. 2005)). As addressed above, a jury could reasonably find that Rickards intentionally kicked Officer Dehning. Unlawfully kicking an officer constitutes an intentional, offensive touching. Additionally, there is no level of pain or injury required for third degree assault under RCW 9A.36.031(1)(g). It is immaterial whether Rickards kicked Officer Dehning hard enough to cause any level of pain. The State presented sufficient evidence from which the jury could find that Rickards had committed third degree assault by kicking Officer Dehning.

Second, Rickards argues that he received ineffective assistance of counsel when his trial counsel failed to request a jury instruction on the lesser-included offense of fourth degree assault. We use the familiar ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145

(2003). Defense counsel's performance is not deficient when he or she does not request jury instructions unsupported by the evidence. *See State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (defendant is entitled to jury instructions if they are supported by the evidence); *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not required to argue self-defense where the defense is not warranted by the facts). If a defendant fails to establish either deficiency or prejudice, this court need not address the other element because an ineffective assistance of counsel claim fails without proof of both elements. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Rickards does not demonstrate deficient performance. A defendant is entitled to an instruction on a lesser-included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) the evidence supports an inference that the lesser crime was committed (the factual prong). *State v. Pacheco*, 107 Wn.2d 59, 68-69, 726 P.2d 981 (1986); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). A person commits fourth degree assault when he or she assaults another under circumstances not amounting to first, second, or third degree assault or custodial assault. RCW 9A.36.041(1).

Even assuming that fourth degree assault can satisfy the legal prong as a lesser included of third degree assault, Rickards cannot satisfy the factual prong of *Pacheco* and *Workman*. In order to satisfy that prong, there must be evidence supporting an inference that the defendant is guilty of the lesser offense instead of the greater offense. *State v. Bergeson*, 64 Wn. App. 366, 369, 824 P.2d 515 (1992). Rickards never contested that he kicked Officer Dehning during the performance of his duties. He only denied that he did so intentionally. Based on this evidence, a

jury could not find that Rickards committed fourth degree assault instead of third degree assault. Rickards counsel's performance was not deficient for not requesting a jury instruction to which Rickards was not entitled. And because Rickards cannot show deficient performance was deficient, his claim of ineffective assistance of counsel fails. *Davis*, 152 Wn.2d at 673.

We affirm Rickards' judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Bridgewater, J.

We concur:

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Houghton, P.J.

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Hunt, J.